FILE COPY

Supreme Court, U.S.
FILED
MAY 26 1958
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM 1958

No. [redacted] 77

WHITNEY D. HAMMOND, Administrator of the Estate of Jim Eskridge, Deceased,

Respondent,

vs.

ZELPH S. CALDER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND/OR TO THE FOURTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY, STATE OF UTAH.

ZELPH S. CALDER
251 So. 3rd West
Vernal, Utah

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM 1958

No. .....

WHITNEY D. HAMMOND, Administrator of the Estate of Jim Eskridge, Deceased,

Respondent,

vs.

ZELPH S. CALDER,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND/OR TO THE FOURTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY, STATE OF UTAH.

CITATION OF OPINION

334 Pac. 2nd 562 and is printed infra p. 8

FOREWORD

1. To refuse petitioner Calder's request that Respondent Eskridge post a non-resident cost bond deprives Calder of his statutory and constitutional rights.

2. Calder was condemned before he was heard, by being compelled to pay his lessees wheat penalty.

JURISDICTION

The opinion of the Supreme Court of Utah was filed January 21, 1959. Calder was given until February 24th, 1959 to file Petition for Rehearing. (Ut. Sup. Ct. R.) Said petition, filed February 24, 1959. It was denied and remittitur sent down to the 4th Judicial District Court of Uintah County March 3, 1959. (See Crt. R.)

QUESTIONS PRESENTED

1. Should Calder win a dismissal without prejudice for Eskridge's failure to file a non-resident cost bond as requested by Calder?

2. Was it due process of law for the court to mandamus Calder to pay Eskridge's excess wheat penalty without notice or opportunity to be heard?

STATUTE INVOLVED

1. Utah Rule of Civil Procedure 12 (j) and (k) and Section 104-44-17 and 18, Utah Code 1953 provides: (j) When the plaintiff is a non-resident he "shall", upon request by defendant, post a cost bond. the proceedings "shall be stayed". (k) If not filed within one month "the court shall, upon motion of the defendant, enter an order dismissing said action". (See Calder's petition for Rehearing, p. 2) Constitution of Utah, Art. XII, Sec. 6 provides: No foreign corporation shall be allowed to do business in this state on more favorable terms than a corporation of

this state. The United States Constitution Article I, Sec. 10 provides: No state shall * * * pass any * * * ex post facto law.

2. The U. S. Constitution, XIV amendment Sec. 1, provides that no state shall deprive any person of property without due process of law nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 13, 1955, Eskridge, a non-resident share-cropping lessee (1/4 of the crop to the lessor, 3/4 to lessee) brought injunctive trespass against Calder, lessor. (Record p. 1) On October 18 "restraining order issued upon filing a bond" in the sum of $500 (R. 8). Bond was never filed. Also Calder's request for Eskridge to file a cost bond of $300 (R. p. 7) was never filed. On October 29 Eskridge was killed in an airplane accident. On November 15, 1955 court gave Eskridge 30 days extension of time to file non-resident cost bond. (R. p. 10).

Dec. 17, 1955 Calder served and filed motion to dismiss because Eskridge had failed to file a non-resident cost bond. (R. p. 11). Jan. 9, 1956 Wilma Eskridge, widow of deceased plaintiff, filed a petition requesting the appointment of Whitney D. Hammond as administrator to carry on the action commenced against Calder by her late husband, praying "said estate be considered nominal for the purpose of fixing bond." (R. p. 84). On Jan. 24th defendants motion to dismiss was denied. (R. p. 13).

June 25, 1956 stipulation entered into settling case, by Calder agreeing to pay 2/7 of the cost of clearing 658 acres (of sagebrush land). (See Calder's brief p. 4 R. 35).

2. On October 16, 1956 plaintiff "moved the court for an order and judgment based on the stipulation entered into between the parties on the 25th day of June, 1956" (Calder's brief, p. 12 R. 38) and the report of the arbitrators, dated October 15, 1956, (R. 36). Notice of Motion and Service Made, (R. 37) calling motion to be heard October 23, 1956 (R. 38), also notice to Calder that arbitrators had filed their report awarding $12 per acre for clearing 658 acres. (Calder's brief, p. 5).

On October 20 arbitrator Goodrich served and filed a request for withdrawal of award of arbitrators because he had not seen the stipulation. Goodrich placed his award at $3 per acre. (R. 40—Calder's brief p. 6).

On October 23, 1956 the trial court issued an order permitting Eskridge "to sell all his share of the wheat harvested on defendant's property in 1956; to wit, 4082 bushels, without penalty", and the defendant is hereby ordered to refrain from any act or action which will in any way prevent or hinder the issuance of a marketing card by the Uintah County Agricultural Stabilization and Conservation Committee authorizing and permitting plaintiff to market 4082 bushels of wheat without penalty, and the "defendant is further

ordered to perform any act it may be required by said committee to procure the issuance of said marketing card." (Calder's brief p. 6). October 31, 1956 Calder posted a bond of $2972.46 to insure payment of excess wheat penalty (Calder brief p. 9 R. 42). On November 2, 1956 Eskridge posted a $2,000 administrator's bond. (R. p. 85½).

REASONS FOR GRANTING WRIT

1. The opinion Supra of the Utah Supreme Court, second paragraph, line 8, says: "On December 7 defendant moved to dismiss, etc." December 7 is error. The record shows that it was December 17, two days after the one month statute of limitations had expired. (See Calder's petition for rehearing, supplement p. 6). This case should have ended here because the statute of limitations had run and death does not stay the statute.

The said opinion also is in error by saying in the last sentence "that a $2,000 surety bond was posted to protect the defendant". Eskridge posted an administration bond of $2,000 eleven days after mandamus was issued and three days after Calder had paid Eskridge's excess wheat penalty with a $2972.46 bond. Calder also suffered loss of a year's wheat crop, for which he had no recourse against Eskridge.

The facts force the conclusion that the said opinion is "a retroactive decision * * * and is as vicious as an ex post factor statute". Chambers *v.* Baker, 131 Fed. 161, 69 L.R.A. 653.

Mr. Justice Henroid in the opinion comments on the Bunting and Kemper cases being the law of this state and controlling. Both of these cases gave relief to the non-resident plaintiff by modifying the trial courts judgment of dismissal with prejudice to judgment without prejudice. Calder is only seeking a dismissal without prejudice so that, a resident, can then have his constitutional right to meet Eskridge, a non-resident, on an equal basis, also, the statute supra "stays all proceedings". Hence, all proceedings before Nov. 2, 1956 was a nullity.

2. "Without Penalty", as is recited in the next to the last paragraph of the opinion, makes an entirely new contract involving a greater consideration than the brush clearing contract stipulated by the parties. Eskridge had the right without even reciting it to sell his wheat under Calder's wheat allotment, which included both of them. The part that concerns this court is Calder receiving a mandate from the trial court to pay Eskridge's wheat penalty, carrying a punishment for contempt if he did not. There was no reservation of stay, no pleading for an alternate writ, affidavit, notice or hearing requesting such an order nor no bond posted by Eskridge to indemnify Calder in case such an order was found to be erroneous.

It is held in *Francisco v. Board of Dental Examiners*, Tex. 149 S.W. 2nd 169 "the fact that judicial review of the order is accorded does not satisfy 'due process of law' if no stay of the effect of the order is

provided and is meanwhile irreparable injury would result subjecting the party to criminal prosecution for its violation." In the case a dentist's license had been revoked upon alleged grounds he had committed a felony.

CONCLUSION

The consideration in this case might seem small to this court, but it is large to this litigant and his constitutional rights are still larger.

WHEREFOR, Calder prays that this case be sent back to be tried on its merits.

Respectfully submitted,

ZELPH S. CALDER
251 So. 3rd West
Vernal, Utah

Acknowledges receipt of 2 copies of the foregoing petition this ..... day of May, 1959.

.....

COLTON & HAMMOND
First Security Bank Bldg.
Vernal Utah

This is to certify that I mailed 2 copies of the foregoing petition to Van Cott, Bagley, Corwall & McCarthy, Sterling D. Colton at 65 South Main, Salt Lake City, Utah on ..... day of May, 1959.

IN THE SUPREME COURT
of the
STATE OF UTAH

WHITNEY D. HAMMOND,
Administrator of the Estate of
Jim Eskridge, Deceased,
Plaintiff and Respondent,
vs.
ZELPH S. CALDER,
Defendant and Appellant.

No. 8827

HENROID, Justice:

Appeal from a money judgment and the denial of a motion to dismiss for failure to file a cost bond. Affirmed with costs to respondent.

In 1950 defendant leased *virgin, untilled* land to one Eskridge for an 8 year term, defendant to get ¼ of the crops grown. The land was broken and farmed. On October 13, 1955, Eskridge sued to restrain defendant from permitting his *stock to damage a wheat crop growing on the land and for damages.* On October 18, defendant demanded a non-resident cost bond.[1] Eskridge died on October 29. Within 30 days and on November 15, plaintiff's attorney moved for an exten-

1. Rule 12(j), Utah Rules of Civil Procedure, requires a non-resident litigant to file a cost bond within 30 days after demand made therfor.

sion to file the bond because of plaintiff's death and in order to have an administrator appointed and substituted as party plaintiff. A 30 day extension was granted. On December 7 defendant moved to dismiss with prejudice for failure to file the bond within 30 days as required by Rule 12 (j). On January 9, Eskridge's widow moved to deny this motion since she had asked that plaintiff Hammond be appointed administrator. On January 12, defendant's motion to dismiss was denied. The administrator later was appointed and posted a $2,000 surety bond.

Thereafter the parties waded through a sea of pleadings, conferences and arguments and the suit initiated to enjoin defendant changed complexion and developed into something akin to a simple suit for damages. All differences were to be resolved by a stipulation entered into on the date of the trial in June, 1956, which called for harvesting and dividing, 1/4 to defendant and 3/4 to Eskridge, of the crops for that year, termination of the lease, defendant to pay Eskridge 2/7 of the cost of "clearing" the land in 1951, such cost to be determined by two appraisers, one to be chosen by each of the parties, Eskridge to remove his property from the land, to turn over immediately the north portion of the farm, all claims between the parties to be settled and "the plaintiff shall have the right to sell his share of the wheat under the wheat allotment of the defendant."

Appraisers were appointed and a writing signed by them was delivered to the court setting the cost of

"clearing" at $12.00 per acre. A few days later the appraiser appointed by defendant asked to withdraw his appraisal and signed an affidavit in which, in substance, he asserted that he had signed too hastily. Evidence was later taken by the court and there is substantial testimony to justify the court's determination that the cost intended by the parties included the plowing, which fact appellant denies, and that the $12 figure was reasonable, such that we do not feel constrained to upset the finding, thus disposing of one of defendant's assigned errors.

Defendant's other errors attack 1) the court's refusal to dismiss for failure to file a cost bond, 2) in adjudging that Eskridge was entitled to sell his wheat under defendant's allotment without penalty, 3) in awarding costs to plaintiff and 4) in refusing to hear defendant's claim that Eskridge removed a granary from the premises.

Treating the assigned errors in reverse, in January, 1958, long after the trial and entry of judgment defendant filed what appears to have been an abortive pleading called "Defendant's Request for Claim Against Plaintiff," claiming to own the granary Eskridge built and removed from the property. We think the court properly refused to entertain the matter. As to the award of costs, under Rule 54(d)(1) costs are allowed to the prevailing party and defendant's reason why he should be awarded costs, that equity would be done, does not seem meritorious under the finding or the rules.

As to the right of Eskridge to sell his wheat under defendant's allotment without penalty, it would seem that the plain wording of the stipulation reasonably lends itself to a construction meaning just that, and the trial court having so construed it, we sustain him.

As to the failure to file the cost bond within the thirty day period, this court has held in *Bunting Tractor Co.* v. *Ford*[2] that failure to file such bond within the prescribed limits but before motion to dismiss, necessarily does not require dismisal with or without prejudice, and in *Kemper* v. *Clarite Battery, Inc.*,[3] that filing such bond even after the motion to dismiss has been made does not require dismissal. This writer suggested in those two cases that Rule 17(j) may have disappeared, but they are the law of this state and controlling. It would seem that in the light of those cases, in view of the fact that a death had made impossible the filing of such bond within the prescribed time, *the fact that timely request was made for time to file it by an administrator who could not have qualified within the time*, and the fact that a $2,000 surety bond was posted to protect defendant, justify an affirmance of the trial court's refusal to dismiss the litigation.

2. 2 Utah 2d 275, 272 P.2d 191 (1954).
3. 2 Utah 2d 280, 272 P.2d 194 (1954).

WE CONCUR:

J. Allan Crockett, Chief Justice

Lester A. Wade, Justice

Geo. W. Worthen, Justice

Roger I. McDonough, Justice